

**Seattle-First National Bank and Firstbank Independent Employees' Association. Cases 19-CA-9835 and 19-CA-9916**

26 August 1983

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN**

On 5 April 1979 the National Labor Relations Board issued its Decision and Order<sup>1</sup> in the above-entitled proceeding finding, *inter alia*, that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by failing to bargain in good faith and implementing portions of its last offer before reaching a valid impasse.

On 5 February 1981 the United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order and remanded the case to the Board to reexamine "the record to determine whether the record as a whole, including the course of negotiations as well as the contract proposals, supports a finding of bad faith."<sup>2</sup> Thereafter, the Board received statements of position from the parties.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered its decision in light of the entire record, the statements of position, and the Circuit Court's remand, which the Board recognizes as binding for the purpose of deciding this case, and for the reasons given herein has decided to dismiss the complaint in its entirety.

The Circuit Court held that finding bad-faith bargaining could not be predicated solely on the Respondent's contract proposals but, additionally, the Board "must show 'substantial evidence that the company's attitude was inconsistent with its duty to seek agreement.'"<sup>3</sup> The General Counsel and the Charging Party submit that there are two additional areas from which the Board may infer bad-faith bargaining: (1) the Respondent's delay in providing information and (2) the timing of the implementation of the Respondent's final offer.<sup>4</sup> The

Administrative Law Judge discussed both of these areas but, because he based his decision solely on the Respondent's bargaining proposals, he found it unnecessary to make specific findings.

On 21 September 1976 the Union requested certain information in preparation for bargaining. The request was repeated on 4 October. The Respondent replied on 17 November that the information would be provided but that the Union would have to reimburse the Respondent. The Respondent also claimed that for the most part the information was not summarized in any of the routine computer reports. On 29 November the Union agreed to negotiate the cost, provided the Respondent submitted a cost estimate. On 6 December the Union requested additional information. A tentative delivery date of 28 February 1977 was agreed upon. However, on 17 February the Respondent claimed that primarily because of a "change in management of the compensation section" it could not have the information available until late March. In mid-March the Respondent stated that it would be ready by the end of the April. On 27 April the Respondent told the Union the material was prepared and that the cost was \$1,125. The Union balked at the cost and declined to take possession at that time. On 17 June the Respondent again informed the Union that the material was ready and that it was "sure we can work something out" with regard to the cost. The Respondent also attached a letter dated 7 December 1976 estimating the cost to be between \$500 to \$1,000. Inexplicably, that letter had never been received by the Union. On 12 July the parties agreed on a cost of \$50 and the Union received the information.

The initial delay in providing the information is suspect; however, under the circumstances of this case we do not draw an inference of bad faith. We especially note that the Union expanded its request on 6 December, and that the Respondent agreed to a target date and, apparently in good faith, informed the Union when it became aware that it would not be able to meet the target date and the reason therefor. The Union did receive the information and it was prepared 2 months before the first bargaining session. Additionally, while an exchange of letters in early December indicates "posturing" by both parties, on 4 January 1977 the Union asked for more information and the Respondent by letter dated 5 January agreed to provide the information and did so on 12 January. Similarly on 18 January the Respondent replied to a request dated 17 January and the information was supplied in early February. Based on the foregoing we cannot say that the Respondent's conduct in this regard evidenced bad faith.

<sup>1</sup> 241 NLRB 753. We note our Supplemental Decision and Order in *Seattle-First National Bank*, 265 NLRB 426 (1982), vacating our decision at 241 NLRB 751 (1979), amending the Union's certification. We have amended the caption to reflect the name of the Union in accordance with that Supplemental Decision and Order.

<sup>2</sup> 638 F.2d 1221 at 1227.

<sup>3</sup> *Id.* at 1226.

<sup>4</sup> Neither of these areas was the subject of an unfair labor practice charge.

The General Counsel and the Charging Party also argue that bad faith should be inferred from the short time between Respondent's final offer and its implementation. On 20 October the Respondent notified the Union that it was terminating the collective-bargaining agreement and, if its last offer was not accepted, it would be implemented on 1 November. The contention is made that because of its experience in previous negotiations the Respondent was aware that it was impossible for the Union to conduct a ratification vote within that period of time. The Respondent argues that the parties agreed to the 10-day notice of termination; that the Union never requested additional time to consider the offer; and, finally, that membership ratification was never in issue, only the approval of the Union's bargaining committee. We agree with this last argument. Thus, the Respondent's letter of 20 October is clearly seeking approval of its final offer from the bargaining committee. It is addressed to the union president and states that the Respondent hopes that "you will reconsider . . . after you have had an opportunity to study [the offer] further . . . . [W]e cannot understand why this offer is unacceptable to you . . . . As a result, you have until the end of this month to accept . . . ." A fair reading of this letter leads us to conclude that the Respondent was not engaging in bad-faith bargaining by requesting approval of its offer by the Union's bargaining committee. Indeed, within the time frame the Union's bargaining committee not only reviewed the offer but canvassed its shop stewards.

Finally, the Charging Party argues that additional evidence of bad faith occurred in early December when the Respondent's attorney agreed to present to the Respondent a collective-bargaining agreement which included a dues-checkoff provision, in return he sought the bargaining committee's promise to recommend ratification to the membership. Subsequently, the Respondent presented to the Union's bargaining committee a somewhat modified agreement, but one which still did not include dues checkoff. The Charging Party contends that the Respondent reneged on its agreement thus evidencing bad faith. However, it is clear from the record, and the Charging Party does not argue to the contrary, that the Respondent's attorney stated that if the bargaining committee would recommend approval of the proposed agreement it would make it easier for him to "sell" the Respondent on dues checkoff. Accordingly, there was no agreement and we decline to draw an inference of bad faith from the Respondent's conduct.

Based on the foregoing we find that there is no additional evidence of bad-faith bargaining. How-

ever, the Circuit Court instructed that should we make this finding we must also determine if, in fact, impasse had been reached before the Respondent implemented its final offer. For the reasons set forth we find that a valid impasse was reached before the Respondent took its unilateral action.

The general criteria for determining impasse are set forth in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* 395 F.2d 622 (D.C. Cir. 1968), where the Board held:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

These factors when applied to this case support a finding that the parties were at impasse. The Respondent and the Union have had a bargaining relationship since 1969 and previously had entered into two 3-year contracts in 1971 and 1974. Thus, the bargaining history favors a finding of impasse. Further, the parties met 36 times with both making proposals and counterproposals. Indeed, there is no contention that the Respondent was dilatory regarding meetings. While the parties had reached tentative agreement on several issues, many remained open, the most important of which was the Respondent's adamant refusal to provide dues checkoff. Even though the Respondent did revise its final offer, it made no concession in this area of primary concern to the Union. Nor is the fact that the Respondent withdrew clauses regarding the no-strike provision, and language requiring that the grievance/arbitration procedure be exhausted before employees could exercise the rights outside the contract, significant. We have previously found that those clauses were never insisted upon to impasse and thus their withdrawal is not dispositive. Finally, the contemporaneous understanding of the parties supports a finding of impasse. Not only did the Respondent clearly express its position that the negotiations were at impasse in its letter of 20 October but, as noted by the Administrative Law Judge, the Union asserted that the Respondent's proposals were so onerous that the Union "could clearly never accept them."<sup>5</sup>

<sup>5</sup> 241 NLRB 753, 755. Additionally, the Administrative Law Judge found that "[i]t is undisputed that a bargaining impasse was reached in late October," and no exception was taken to this finding. *Id.* at 755, 762.

Based on the foregoing, and in view of the Circuit Court's remand, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it unilaterally instituted its final offer because a valid impasse had been reached. Accordingly, we will dismiss the complaint in its entirety.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the complaint be, and it hereby is, dismissed in its entirety.